Supreme Court, U.S.
FILED
NOV 7 1994
OFFICE OF THE CLERK

No. 93-1935

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CURTISS-WRIGHT CORPORATION,
Petitioner,
v.
FRANK C. SCHOONEJONGEN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICI CURIAE ERISA INDUSTRY COMMITTEE; ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS; ALLIED-SIGNAL, INC.; DEL MONTE CORPORATION; HEUBLEIN, INC.; INVESCO, INC.; PEPSICO, INC.; AND RJR NABISCO, INC. IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does section 402(b)(3) of ERISA, 29 U.S.C. § 1102(b)(3), require an employee benefit plan to identify specific individuals within the sponsoring organization who have authority to amend the plan, or otherwise require an amendment procedure more detailed than that contained in a plan that expressly reserves the sponsor's right to amend?

2. Does procedural noncompliance with ERISA causing no harm to plan participants -- here the Court of Appeals held that a plan's amendment provisions were insufficiently specific under ERISA section 402(b)(3) -- give rise to a substantive remedy -- here, striking an amendment from the plan document to invalidate a termination of non-vested welfare benefits?

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STATEMENT OF INTEREST[1]

The ERISA Industry Committee ("ERIC") is a non-profit association committed to the advancement of employee retirement, health, and welfare benefit plans of America's largest employers. ERIC's 125 members provide comprehensive retirement, health care coverage and other

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[1] This brief is filed with the consent of the parties. Their letters of consent were filed with the Clerk of the Court with this brief.

comprehensive retirement, health care coverage and other economic security benefits directly to some 26 million active and retired workers and their families. The association has a strong interest in matters affecting its members' ability to deliver those benefits, their cost and their effectiveness, as well as the role of those benefits in the American economy. The Association of Private Pension and Welfare Plans is a broad-based trade association that focuses on the preservation and growth of the voluntary, private sector employee benefits system. Approximately 100 million participants and beneficiaries are covered by plans maintained or serviced by its 240 members, which include many Fortune 500 companies as well as leading employee benefits service organizations. Both associations routinely file briefs as amicus curiae in important employee benefits litigation. Allied-Signal, Inc.; Del Monte Corporation; Heublein, Inc.; INVESCO, Inc.; PepsiCo, Inc.; and RJR Nabisco, Inc. are large corporations. Each sponsors employee benefit plans in which almost all of their employees are participants.

The Third Circuit's decision upsets the common understanding of statutorily mandated plan language and threatens sponsors of employee benefit plans with vexatious litigation and massive liability. Plan amendments that met all legal requirements at the time they were made will be challenged if the ruling below is upheld. Members of the amici associations, as well as the corporate amici, will be adversely affected if the decision is affirmed.

BACKGROUND

A. Introduction.

The Employee Retirement Income Security Act of 1974, as amended, ("ERISA") is a "comprehensive and reticulated statute," *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980), and embodies a complicated set of legislative choices between competing values. *Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063, 2071 (1993). Although tensions inevitably result from these choices, courts should not "attempt to adjust the [congressionally set] balance between those competing goals," *id.* at 2072, even for the most sympathetic of reasons. *See McGann v. H & H Music Co.*, 946 F.2d 401 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992).

Private sector employee benefit plans exist and are regulated in a voluntary setting, involving a delicate balance under which marketplace forces determine the establishment and continued maintenance of pension and welfare plans within a regulatory system imposed by ERISA and, for tax-qualified plans, the Internal Revenue Code ("Code"). When economic circumstances permit expansions of plan coverage and improvements in benefits, employers respond favorably because, due to competitive pressures, it is in their interest to do so. Adverse economic circumstances lead to contractions of coverage and curtailment of benefits, even termination of plans. In 1974, Congress could have mandated coverage and it could have mandated certain types or levels of benefits. It did neither, opting instead to foster plan formation and maintenance by continuing the

voluntary system, encouraging flexibility in plan design and operation, and making a series of fine value judgments respecting conditions and safeguards to be applied to these voluntarily maintained plans.

In pension plans, these judgments are reflected in, *inter alia*, favorable tax treatment, minimum standards for participation, vesting and accrual, funding rules, and a limited guaranty program for plans that terminate with insufficient assets. Fiduciary responsibility rules, reporting to the government agencies and disclosure to plan participants and beneficiaries round out the regulatory regime. These latter rules apply to welfare plans, but in recognition of the difficulty of predicting costs in such plans, especially health care plans, Congress did not impose minimum vesting and similar rules, because their imposition would tilt the delicate balance too much against the voluntary maintenance of such plans. *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935 (5th Cir.), *cert. denied*, 114 S. Ct. 196 (1993) (quoting *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488 (2d Cir. 1988)).

The opinion below has dimensions that transcend the *Curtiss-Wright* facts. It opens to attack on procedural grounds in costly litigation the validity of many amendments that adversely modify benefits provided by private sector employee benefit plans. In health care plans, for example, increased deductibles and co-payments, even those imposed years ago, may be rendered invalid *ab initio* if a plan did not state an amendment procedure that was sufficiently elaborated to meet the Third Circuit's standard. Even legally required benefit reductions under pension plans

may be invalid under the decision, casting a shadow on such plans' continued tax qualification.[2]

Although the Third Circuit purported to narrow its ruling to modifications that are "advantageous to the sponsor's interest," Pet. App. at 11a n.5, this disclaimer offers cold comfort. Amendments that are advantageous to participants are virtually never challenged.[3] Further, amendments frequently consist of a group of modifications, some adverse to participants and some that improve benefits.[4] Litigation about how to characterize a modification will assume a life of its own. The decision, in short, is a wildcard that portends widespread uncertainty and unanticipated cost for plan sponsors and instability for plans and plan participants. It is in no one's best interest.[5]

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[2] *E.g.*, most qualified pension plans had to be amended in order to satisfy congressionally mandated reduced limits on compensation that may be taken into account in calculating benefits. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No 103-66 § 13212(a)(1), 1993 U.S.C.C.A.N. (107 Stat.) 312, 471 (amending I.R.C. § 401(a)(17)).

[3] See note 8 below for an illuminating exception.

[4] Additionally, even a single modification may affect different classes of participants in different ways, advantageous to some and disadvantageous to others.

[5] The plan sponsor action that gave rise to this case, a modification of retiree health benefits adverse to the retirees' interest, is not unusual. Adverse modifications to welfare plan benefits have been occurring regularly for a number of years. General Accounting Office, *Employee Benefits: Extent of Companies' Retiree Health Coverage* 8-9 (March 1990). These modifications, in turn, result largely from adverse economic circumstances, chiefly marketplace dislocations arising from, *inter alia*, global competition, and health care

B. Summary Statement Of Facts And Proceedings Below.

In 1966, Curtiss-Wright ("CW") began to provide health benefits to retirees formerly employed at its Wood-Ridge facility. Ten years later, CW amended its employee welfare benefit plans, including the plan under which health benefits were provided to retirees ("Plan"), to conform to ERISA. An umbrella "Constitution" was adopted, applying to all CW plans. At all times relevant to this action, the Constitution contained a reservation of CW's right to amend the Plan.[6] Numerous documents, including summary plan descriptions ("SPDs") provided to participants from 1973 on, also contained reservations of rights. *See* Pet. App. at 4a-5a. A new SPD issued in 1983 contained the following language:

> Coverage under this Plan will cease for retirees and their dependents upon termination of business operations of the facility from which they retired.

J.A. at 44.

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cost inflation. Health care costs more than doubled to 12.2 percent of gross national product from 1965 to 1990. Joseph S. Piacentini & Jill D. Foley, *EBRI DATABOOK on Employee Benefits* 188 (2d ed. 1992).

[6] The Constitution provided: "The Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan." J. Ex. No. 64, Art. 6.1, J.A. at 36.

> Although the Company expects this Plan to continue in its present form for an indeterminable period, this Plan is not a vested Plan and as such is subject to modification or termination by the Company at any time.

Id. at 49. Later in 1983, CW's Wood-Ridge plant was closed and benefits of retirees who had been employed there ceased in accordance with this language.

A class consisting of these retirees brought this action in 1984. On the eve of trial, plaintiffs' sole remaining claim was that their pre-1983 benefits had vested contractually. Pet. App. at 102a-103a. The court found that CW's intent as expressed in the Plan and SPD was ambiguous, and allowed plaintiffs to present evidence extrinsic to those documents. *Id.* at 104a. At trial, the court characterized the 1983 coverage cessation change in Plan language as an amendment. Finding that CW's reservation of the right to amend was not itself an amendment procedure that complied with ERISA section 402(b)(3), it invalidated the amendment. *Id.* at 37a. However, the court held that because of the 1976 reservation of rights, plaintiffs' benefits were not vested, and could be modified or even terminated if a statutorily sufficient amendment procedure were first adopted. *Id.* at 39a-40a.

The Third Circuit affirmed.[7] Comparing CW's reservation of rights to the statute, which requires benefit plans to "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan," ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), the court concluded without analysis that a reservation of a right to amend is not the same as a procedure to amend. Pet. App. at 7a.[8]

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[7] The Third Circuit issued two opinions. The first, vacated opinion incorrectly stated that CW could not have terminated the Plan unless it complied with 29 U.S.C. § 1341(b), Pet. App. at 24a, which applies only to pension plans. ERISA § 4021(a)(1), 29 U.S.C. § 1321(a)(1). The second opinion rejected CW's termination argument on the factual ground that there was no evidence that anyone at CW considered the discontinuation of benefits to Wood-Ridge retirees to be a termination of the plan. Pet. App. at 12a.

[8] In an earlier Third Circuit case, *Huber v. Casablanca Indus., Inc.*, 916 F.2d 85 (3d Cir. 1990), *cert. dismissed*, 113 S. Ct. 1070 (1993), an almost identical reservation of rights was found to be a statutorily sufficient amendment procedure. *See* note 11, below. There, however, the plan sponsor was the board of trustees of a multiemployer pension plan seeking to recover withdrawal liability from a former contributing employer that, among other defenses and counterclaims, challenged a plan amendment. *See* ERISA §§ 3(37) and 4201-4402, 29 U.S.C. §§ 1002(37) and 1381-1461. The amendment, increasing benefits under the plan and changing the withdrawal liability allocation formula, had the effect of increasing the employer's withdrawal liability, *id.* at 105-06, thereby benefiting the plan's participants. The distinction drawn by the court below between the reservation of rights in *Huber* and CW's reservation of rights is analytically suspect, but is readily explicable in terms of the result achieved in each case, *i.e.*, the *Huber* reservation sufficed as a statutorily sufficient procedure where it advantaged the participants, but CW's reservation did not suffice where it disadvantaged the participants.

The court held that the absence of an amendment procedure invalidated the 1983 amendment. *Id.* at 11a. It reasoned that invalidation *ab initio* was necessary, alluding to cases holding that challenged amendments should be stricken when a plan has, but does not follow, an amendment procedure. *Id.* at 10a-11a. Finally, the court affirmed the district court's holding that the reservation of rights was valid, *id.* at 14a, noting that the Plan could be amended to terminate the Wood-Ridge retirees' benefits, but only if CW's Board first adopted an amendment procedure. *Id.* at 11a.

C. Legal Setting.

Employee benefit plans under ERISA are either pension plans, which provide retirement income, or welfare plans, which provide health care benefits, severance pay, and a host of other non-pension benefits. ERISA §§ 3(1)-3(3), 29 U.S.C. §§ 1002(1)-1002(3). Pension plans are regulated more extensively than welfare plans. Only pension plans are subject to ERISA's vesting and accrual standards. ERISA §§ 201(1), 203 and 204, 29 U.S.C. §§ 1051(1), 1053 and 1054. Unlike welfare plans, pension plans also are subject to rules that limit a sponsor's ability to terminate if the plan is insufficiently funded. ERISA §§ 4001-4071, 29 U.S.C. §§ 1301-1371. These differences are "not accidental," and they allow welfare plan sponsors "to amend or terminate coverage at any time." *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935 (5th Cir.), *cert. denied*, 114 S. Ct. 196 (1993). Pension plans also can be amended and, if tax-qualified, frequently must be amended

to comply with changes in the Code and regulatory guidance issued by the Internal Revenue Service ("IRS").

Indeed, the amendment procedure included in model qualified plans provided by the IRS is similar to CW's reservation of rights and merely states that the sponsor may amend any part of the plan. *See* IRS Regional Prototype, 21 Pens. Rep. (BNA) Special Supp. No. 23, S-59 (June 6, 1994); IRS Defined Contribution Listing of Required Modifications, 21 Pens. Rep. (BNA) Special Supp. No. 14, S-43 (April 4, 1994); Revised IRS List of Required Modifications, 20 Pens. Rep. (BNA) Special Supp. No. 13, S-128 (March 29, 1993). Qualified plans that follow this model language face possible disqualification, with its accompanying hardship to participants and sponsors alike, if the decision below is affirmed.[9]

Because section 402(b)(3) applies to all plans, whether pension or welfare, the decision below applies with equal vigor to all ERISA plans. It raises the specter of massive disruption to tax-qualified plans if amendments made to ensure a plan's continued qualification now are invalidated because the plan's amendment procedure is inadequate under the Third Circuit's reasoning. However, amici focus here on the non-statutory vesting concept that courts have adopted respecting welfare plans because the subject of this action is a welfare plan and because an

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[9] In a tax-qualified plan, employers may deduct contributions, contributions are not taxable as current income to participants, and the plan's earnings are not currently taxed. This preferential treatment is not available if a plan loses its qualified status. Boris I. Bittker & Martin J. McMahon, Jr., *Federal Taxation of Individuals*, ¶ 37.1 (1988).

understanding of how benefits may vest in a welfare plan illuminates the flaws in the reasoning of the decision below.

The non-vested, amendable, and terminable nature of welfare benefits reflects congressional concern over plan sponsors' inability to control the cost of these benefits. "Automatic vesting was rejected because the costs of [health] plans are subject to fluctuating and unpredictable variables." *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988). Because welfare plan benefits do not statutorily vest, retirees whose benefits are modified adversely, such as the Wood-Ridge retirees, must prove that their benefits vested, if at all, by contract. *Id.* at 491.

In cases not involving collectively bargained benefits, courts have looked first to the plan to determine whether retirees had a contractual right to vested post-retirement benefits. *See, e.g., Wise*, 986 F.2d at 929; *Alday v. Container Corp. of America*, 906 F.2d 660 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Howe v. Varity Corp.*, 896 F.2d 1107 (8th Cir. 1990); *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Moore*, 856 F.2d at 488. Where a plan sponsor has unambiguously reserved the right to amend in the plan and SPDs ("plan documents") before the challenged modification occurs, extrinsic evidence -- *e.g.*, letters, memoranda, and parole evidence outside the four corners of the plan documents -- has been ignored. *See Wise*, 986 F.2d at 937-38; *Moore*, 856 F.2d at 492.

Although included in Part 4 of Title I of ERISA ("Fiduciary Responsibility"), ERISA section 402 is

essentially a disclosure requirement. It requires that a plan be written and contain certain information. The plan instrument must list the named fiduciaries who have authority over the plan, ERISA § 402(a), 29 U.S.C. § 1102(a), and must, *inter alia*, provide an amendment procedure. ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3). Significantly, the plan instrument itself need not be furnished to plan participants automatically, but merely must be made available upon request. ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4).

SUMMARY OF ARGUMENT

CW's reservation of rights was an amendment procedure that satisfied the requirements of ERISA section 402(b)(3). Comparing paragraph (3) to the rest of subsection (b) and to other, far more detailed disclosure rules[10] demonstrates Congress's intent that paragraph (3) not be interpreted to require more than a simple statement that a plan may be amended by the plan sponsor.

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[10] Very detailed disclosure to a plan's participants and beneficiaries is required regarding plan substance and their rights under the plan and ERISA, *e.g.* what benefits their plan provides, the plan's annual financial status, their accrued benefits, their right to continued health coverage at group rates if their employment ceases. ERISA §§ 101(a)(1), 104(b)(3), 105(a) and 606, 29 U.S.C. §§ 1021(a)(1), 1024(b)(3), 1025(a) and 1166. Participants may bring an action against an administrator who fails to provide this information upon request and can recover up to $100 for each day of the violation. ERISA § 502(c)(1), 29 U.S.C. § 1132(c)(1).

Congress's intent respecting the minimal degree of detail for an amendment procedure is further reflected by its omission of a "procedure" requirement for plan termination. If a plan may be terminated, ending both coverage and benefits, without following a procedure, no statutory purpose is served by requiring an amendment procedure that is any more detailed than a reservation of rights.

A more detailed amendment procedure would not have told the retirees anything more useful to them than what they knew from the reservation of rights. Because ERISA does not require a particular type of amendment procedure, a corporate plan sponsor may amend in any way that it normally can act, including through action of an authorized employee. A "company" is a person within the meaning of ERISA, and identification of "the Company" as the person who can amend the plan satisfies section 402(b)(3).

Even if the CW reservation did not satisfy section 402(b)(3), the violation was a procedural one and did not prejudice or harm the plaintiffs. Nor did CW act in bad faith or mislead the retirees. The appropriate remedy for such a violation is, at most, an injunction directing CW to adopt a statutorily sufficient amendment procedure. The remedy imposed by the court below -- invalidation of the amendment *ab initio* -- was drastically disproportionate to the severity or effects of the violation, and unwarranted. In leaping from the violation to the remedy of *ab initio* invalidation, the Third Circuit ignored both sound principles of trust law and its own precedent.

The decision below should be reversed, except insofar as it recognized the validity of the reservation of rights to amend or terminate the Plan.

ARGUMENT

A. CW's Reservation Of Rights Provided A Statutorily Sufficient Procedure.

CW's reservation of rights both provides an amendment "procedure" and identifies the "person" authorized to amend. The plan instrument -- the Constitution -- states that the Plan may be changed by "the Company." The language of the statute requires no more and, before this case, no court had required more. A comparison with the amendment procedure endorsed by the Third Circuit panel in *Huber* is useful. That procedure is also a reservation of rights, nearly identical to CW's and no more elaborated than CW's.[11] Although plans are, and often must be, written in technical language, both reservation clauses are clear and to the point. As explained above, note 8 and accompanying text, the *Huber* court held that the reservation there provided a statutorily sufficient procedure. *Huber* at 106.

There is a strong inference in section 402(b)(3) that its drafter contemplated an amendment procedure no more elaborate than the CW or *Huber* reservations. By contrast,

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[11] "At any time and from time to time the Trustees may amend or modify this plan in whole or in part," *Huber*, 916 F.2d at 105 n.43.

each of the other paragraphs of section 402(b) demands more detail. The most exacting is paragraph (4), which requires the plan to "*specify the basis* on which payments are made to and from the plan" (emphasis added). Paragraph (2) requires the plan to "*describe* any procedure . . . for the allocation of responsibilities for the operation and administration of the plan" (emphasis added). Even paragraph (1), which also begins with the phrase "provide a procedure," ultimately demands more: the procedure for establishing and carrying out a funding policy and method must be "consistent with the objectives of the plan and the requirements of this title." ERISA § 402(b), 29 U.S.C. § 1102(b). The degree of elaboration called for by each of the other paragraphs of section 402(b) demonstrates that Congress knew how to require something more than a simple statement when it wished to do so.

The inference that the disclosure required by section 402(b)(3) of ERISA is satisfied by a declaration that the plan can be amended by the sponsor is strengthened upon review of other ERISA disclosure provisions. The statute contains a multitude of requirements intended to advise participants and beneficiaries about the substance of their plans and their rights thereunder. These provisions are very detailed and specific. *See* note 10, above. Section 402(b)(3), by contrast, deals with procedure. Its purpose is not to explain what the plan provides to participants and beneficiaries but rather, the manner in which it can be changed and by whom. CW's reservation satisfied this purpose.

The interpretation of section 402(b)(3) in the decision below is particularly problematic in light of ERISA's treatment of a welfare plan termination. ERISA requires no procedure to terminate welfare plans.[12] CW clearly reserved the right to terminate, J.A. at 36 and 49, and the Third Circuit upheld the validity of that reservation.

If a plan sponsor may terminate an entire plan, ending all benefits for all participants, without following any statutorily-mandated "procedure," no statutory purpose is served by importing elaborate procedural content into section 402(b)(3) through judicial fiat. Such an interpretation would make it easier to terminate a plan than to amend it.[13]

A more detailed procedure, identifying CW's Board of Directors as suggested in the decision below, would not have provided the retirees with information any more useful to them than what they were advised by the reservation of rights. It most certainly would not have enabled them "to determine with certainty at any given time what the plan

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[12] The only ERISA provisions bearing on welfare plan terminations are §§ 403(c)(1) and 403(d)(2), 29 U.S.C. §§ 1103(c)(1) and 1103(d)(2). However, they do not restrict the right to terminate, but rather address the disposition of plan assets upon termination.

[13] Nothing in ERISA prohibits the termination of a welfare plan followed immediately by the establishment of a new plan with different benefits or covering a different group of participants. However, termination and reestablishment is cumbersome and needlessly expensive as a substitute for an amendment.

provides."[14] Pet. App. at 8a. Consistent with its Congressional goal of fostering voluntary plan establishment and maintenance by employers, ERISA does not require a role for participants in plan amendments.[15] CW's reservation of rights therefore provided Plan participants with all knowledge they could use about how their Plan could be amended. It alerted them to the possibility that a change could be made at any time, that it could be a total or partial change, and that CW would decide whether, when, and how to change the Plan.

Because section 402(b)(3) does not specify any particular procedure, a company may amend in any way it could normally accomplish corporate objectives, including but not limited to action by the board of directors or action by an authorized employee pursuant to general corporate or agency law principles. *See United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738 (W.D. Va. 1974) ("A corporation can only act through its employees and, consequently, the acts of its employees, within the scope of

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[14] Even an extremely detailed amendment *procedure* would not inform participants of a plan's substantive provisions, nor would it assure participants that any particular "amendment" complied with the procedure.

[15] Amending a plan is a function of the plan sponsor acting as a settlor. *See, e.g., Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1160-62 (3d Cir. 1990); *Ryan v. Chromalloy American Corp.* 877 F.2d 598 (7th Cir. 1989); *Musto v. American General Corp.*, 861 F.2d 897, 911-12 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987); Letter from D.M. Kass, Asst. Sec'y., Dept. of Labor, to J.N. Erlenborn, 13 Pens. Rep. (BNA) 472 (March 17, 1986).

their employment, constitute the acts of the corporation."); *Nationwide Mut. Ins. Co. v. Darden*, 112 S. Ct. 1344, 1348 (1992) (deeming traditional agency law principles relevant to understanding a poorly defined term -- "employee" -- where ERISA contained no indication that applying such principles thwarted congressional design).

B. CW's Procedure Identified The "Person" With Authority To Amend The Plan.

CW's identification of "the Company" in its amendment procedure more than satisfied section 402(b)(3). In this regard, CW's procedure was more extensive than required. Read literally, paragraph (3) does not demand identification *in the plan* of persons with authority to amend but only that a "procedure . . . for identifying [them]" be provided. ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3).

"Person" is a term expressly defined in ERISA. Section 3(9) defines a "person" as:

> an individual, partnership, joint venture, *corporation*, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

ERISA § 3(9), 29 U.S.C. § 1002(9) (emphasis added).

The conclusion of the court below that "the Company" does not identify a person ignored section 3(9).[16] It is widely understood and accepted that a company is a "person" for the purposes of ERISA. For example, ERISA section 3(21) defines a fiduciary as a "person" who has or exercises the authority listed in that section. Both courts and the Department of Labor recognize that a corporation is a "person" and can thus be a "named fiduciary" for the purpose of ERISA section 402(a)(1). *Confer v. Custom Eng'g. Co.*, 952 F.2d 34, 36 (3d Cir. 1991); 29 C.F.R. § 2509.75-5, FR-3.[17]

The distinction drawn by the Third Circuit between "the Company," which CW used, and "the Trustees," which that court deemed sufficient in *Huber*,[18] is legally and factually meaningless. Neither word is expressly found in ERISA section 3(9). The words "corporation" and "trust"

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[16] *See Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989) ("There is, however, a more fundamental problem with the Court of Appeals' interpretation of the term 'participant': it strays far from the statutory language.").

[17] The broad definition of "person," including corporations and other entities, also applies in other ERISA contexts. For example, ERISA prohibits certain transactions between plans and a "party in interest." Among such parties is "a person providing services to [a] plan." ERISA §§ 3(14)(B) and 406(a), 29 U.S.C. §§ 1002(14)(B) and 1106(a). Many such "persons" are companies, typically corporations, and have been sued as such for engaging in prohibited transactions. *See, e.g., Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209 (2d Cir. 1987). Liability to the Pension Benefit Guaranty Corporation for unfunded pension plans is also imposed on "persons." ERISA § 4062, 29 U.S.C. § 1362.

[18] *See* notes 8 and 11, above.

are used. Corporate employers and trustees are treated equally elsewhere in the statute. If a written plan does not identify the administrator, ERISA states that the sponsor is the administrator. Sponsor, in turn, is defined as the employer in a single-employer plan, and the board of trustees in a multiemployer plan. ERISA § 3(16), 29 U.S.C. § 1002(16). There is no statutory basis for validating an amendment by "the Trustees" of a multiemployer plan and not validating one by "the Company" in a single-employer plan.[19]

C. *Ab Initio* Invalidation Of The 1983 Amendment Was A Wholly Inappropriate Remedy And Contrary To Established Principles Of Trust Law.

Assuming *arguendo* that the reservation of rights did not satisfy the requirements of section 402(b)(3), invalidation of the amendment *ab initio* was the wrong remedy. Under established principles of trust law, if a settlor has reserved power to amend but has not specified the manner of amendment, the "settlor may exercise the power in any manner that 'sufficiently manifests his intention to modify the trust.'" *Biggers v. Wittek Indus., Inc.*, 4 F.3d 291, 295 (4th Cir. 1993) (quoting *Restatement*

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[19] Additionally, the reasoning of the court below raises the specter of other courts interpreting section 402(b)(3) to require identification of individuals by name in the plan document. Yet each time an identified individual left his or her position and was no longer empowered to amend the plan, the plan document itself would have to be amended to reflect their departure and replacement. This would be confusing and wasteful, and would further no statutory purpose.

(Second) of Trusts, § 331 cmt. e.). Relying on the trust law analogy, the Fourth Circuit held "that in the absence of . . . procedures for amendment, a writing amends a plan . . . when accompanied by a clear manifestation of an intent to alter the . . . plan . . . . A [contrary] rule *would expose companies to unpredictable consequences whenever they undertook a review of existing policies.*" *Id.* at 296 (emphasis added).[20]

Deibler v. United Food and Commercial Workers' Local Union 23, 973 F.2d 206 (3d Cir. 1992), also applied this principle. *Deibler* involved a long-standing severance plan for local union officers that was terminated by resolution adopted by a trustee appointed by the parent national union after the local encountered financial difficulties. The plan had no reservation of rights and no amendment procedure. Plaintiff Deibler was dismissed from his position shortly after the resolution and his demand for severance benefits was denied. The Third Circuit held that the resolution manifested a clear intent to amend the severance pay plan and upheld the denial of benefits. *Id.* at 210.

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[20] The *Biggers* court cited *Adams v. Avondale Indus., Inc.*, 905 F.2d 943 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990), for the proposition that lack of an amendment procedure does not render a plan unamendable. The *Adams* court, in a case involving severance benefits, equated a reservation of rights with an amendment procedure and validated a written amendment reducing benefits where plaintiff plan par icipants failed to show detrimental reliance based on the lack of a procedure. *Id.* at 949.

The Third Circuit in *Curtiss-Wright* ignored this body of law and did not inquire whether intent to amend the plan was manifested, but rather relied on inapposite case law, where a procedure was in the plan but the plan sponsor failed to follow it in making an amendment. Pet. App. at 10a-11a (citing *Albedyll v. Wisconsin Porcelain Co. Rev. Ret. Plan*, 947 F.2d 246 (7th Cir. 1991), and *Frank v. Colt Industries, Inc.*, 910 F.2d 90 (3d Cir. 1990) *reh'g and reh'g en banc denied*).

Juxtaposing *Murphy v. Keystone Steel & Wire Co.*, 850 F. Supp. 1367 (C.D. Ill. 1994), with the decision below provides an instructive contrast. In *Murphy*, Keystone had maintained health benefits for retirees pursuant to a series of collective bargaining agreements. Keystone then unilaterally announced prospective adverse modifications affecting certain retirees. The plan had no amendment procedure. Ruling on cross-motions for summary judgment, the district court followed the trust law analogy, inquiring whether Keystone had manifested a clear intent to amend. Finding that it had[21] and that the plaintiff class could not demonstrate detrimental reliance, the court refused to invalidate the amendment and granted Keystone's summary judgment motion.[22] *Id.* at 1378-82.

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[21] *Murphy's* explicit linkage of retiree health benefits to the duration clause of the collective bargaining agreement arguably was less clear than CW's reservation of rights, which unmistakably advised retirees that their plan might be amended.

[22] The court noted that plaintiffs were not foreclosed from forcing Keystone to comply prospectively with section 402(b)(3). *See* ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

CW's reservation of rights, even if not sufficient under section 402(b)(3), manifested intent even more clearly than in *Murphy*. Further, CW's amendment, like the announcement given to the *Murphy* retirees, gave the Wood-Ridge retirees "the same 'warning' that compliance with an amendment procedure satisfying ERISA would have given them." *Id.* at 1382. Also, as in *Murphy*, one cannot "perceive any substantive harm to [the retirees] which exists by reason of [CW's] failure to comply with [402(b)(3)] as distinct from the harm resulting from the amendment itself," *id.*; that is, the CW retirees did not detrimentally rely on the absence of an amendment procedure.

Here, both the Plan and the SPD advised participants, including the plaintiff class, that CW ("the Company") could at any time amend or terminate the plan. The reservation of rights, even if not an amendment procedure within the meaning of section 402(b)(3), put them fully on notice that their benefits were not permanent and immutable. An amendment procedure that, in the eyes of the Third Circuit, passes muster under section 402(b)(3), *i.e.*, one that reserved the right to amend to the "Board of Directors" of the company, would not have given them any material information they did not have by virtue of the actual reservation.[23]

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[23] It strains even credulity to imply, as does the court below, that from the perspective of an employee or retiree of a large company there is any functional distinction between identification of "the Company" and identification of the "Board of Directors" of the company.

As noted above, the requirements of section 402(b) are properly viewed as part of ERISA's disclosure regime. Although lodged in the portion of the statute that regulates the conduct of fiduciaries, they have little to do with fiduciary responsibility, but rather with disclosure obligations relating to plan structure.[24] They speak to provisions that must be part of a plan, and paragraph (3) in particular, addresses a settlor function -- plan amendments. *See* note 15, above.

The weight of recent authority holds that a plan sponsor's failure to satisfy an ERISA disclosure requirement does not warrant damages, absent a showing of bad faith, active concealment, or prejudice to participants. *See Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580, 588-89 (1st Cir. 1993); *Godwin v. Sun Life Assur. Co.*, 980 F.2d 323, 328 (5th Cir. 1992); *Harsch v. Eisenberg*, 956 F.2d 651, 662 (7th Cir.), *cert. denied*, 113 S. Ct. 61 (1992); *Kreutzer v. A.O. Smith Corp.*, 951 F.2d 739, 744-45 (7th Cir. 1991), *reh'g en banc denied*, 1992 U.S. App. LEXIS 2092 (7th Cir. 1992); *Plotkin v. Bearings, Ltd.*, 777 F. Supp. 1105, 1108 (E.D.N.Y. 1991); *United Paperworkers Int'l Union, Local 14 v. International Paper Co.*, 777 F. Supp. 1010, 1021 (D. Me. 1991).

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[24] *See* H.R. Rep. No. 553, 93d Cong., 1st Sess. 11, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649 (purpose of ERISA disclosure rules: "that the individual participant knows exactly where he stands with respect to the plan -- what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and who are the persons to whom management and investment of his plan funds have been entrusted.").

Additionally, three decisions of this Court recognize that "[r]etroactive liability could be devastating for a [plan]." *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 722 and n.42 (1978); *Florida v. Long*, 487 U.S. 223, 235-36 (1988); *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1105-08 (1983). Even where the law is clear to this Court, it has acknowledged that "conscientious and intelligent administrators . . . , who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed that [the challenged plan] was entirely lawful." *Manhart* at 720. Retroactive application of the decision below will, at a minimum, foster expensive, court-clogging litigation and threatens massive liability for "conscientious and intelligent" plan sponsors. Should the Court find for the retirees, equitable considerations strongly support prospective application only.

Given the Third Circuit's recognition that CW's reservation of rights trumped plaintiffs' claim that they had a vested right to their benefits, this is a "no harm, no foul" case, pure and simple. No retiree was misled, disadvantaged, or otherwise harmed in any way by CW's failure to provide a more elaborated amendment procedure. The "remedy" provided below is punitive and drastically out of proportion to the severity of the violation.

CONCLUSION

For many years before the early '80s, economic conditions allowed plan sponsors to extend health care

benefits to retirees and to improve those benefits successively.[25]

By the late '70s, health care costs had begun to escalate dramatically, coinciding with major economic dislocations caused by foreign competition and other factors. Relying on reservations of rights clauses, many plan sponsors during the past 15 years have responded to these phenomena by, *inter alia*, amending health plans to institute or increase deductibles and co-payments, adopt managed-care mechanisms, eliminate or curtail benefits, or even terminate plans.[26]

If the Third Circuit's holding respecting the remedy is affirmed, all of these adverse modifications may be challenged, leading to a flood of federal court litigation and potential liability for plan sponsors of hundreds of millions of dollars in the aggregate.

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[25] None of those improvements, most of which were accomplished by plan amendment, was ever challenged, of course, nor was it ever suggested that the plan sponsor's reservation of rights was a statutorily insufficient amendment procedure to support such amendments. *See Murphy*, 850 F. Supp. at 1375: "In fact, Plaintiffs' counsel admitted during argument that their legal theory allowed them to accept the benefits of any favorable changes . . . over the years . . . but not unfavorable changes, a position made easier by the fact that he could not recall any unfavorable changes prior to the action by Keystone giving rise to the controversy at issue."

[26] Similarly, pension plans have been amended to modify benefits adversely. As part of its balancing of competing objectives, Congress in ERISA prohibited cutbacks of accrued benefits, *see* ERISA § 204(g), 29 U.S.C. § 1054(g), but pension plans may be amended to provide less generous benefit formulas prospectively.

There is a final point to be made. Absent bad faith, no court heretofore has held that active employees covered by a health care plan that is amended to modify benefits adversely may insist on maintenance of the pre-amendment, higher level of benefits. The reservation of rights in non-bargained plan documents has uniformly been understood to prevent a claim of contractual vesting before retirement, while in collectively bargained plans adverse modifications made pursuant to bargaining are upheld with respect to active employees. However, if an amendment adversely modifying active participants' benefits can be challenged on the grounds that the plan did not provide a statutorily sufficient amendment procedure, active employees will be able to side-step sound doctrine and challenge even modifications made many years ago.

Amici believe they have presented compelling arguments that CW's reservation of rights was a statutorily sufficient procedure and, even if it was not sufficient, that the remedy provided by the court below was improper. CW's reservation of rights is a formulation commonly incorporated in private sector employee benefit plans and, at least before the decision below, was understood by plan sponsors as satisfying ERISA's amendment procedure requirement. Consequently, CW should not incur liability for following what was accepted industry practice, particularly where no retiree was harmed.

However, if this Court should determine both that CW's reservation of rights did not provide a statutorily sufficient amendment procedure and that invalidation *ab initio* of the 1983 amendment is an appropriate remedy in

this case, it should limit the effect of its holding to this case. Plan sponsors then would have to review their reservations of right/amendment procedures and revise them, if necessary in light of this Court's ruling. However, they will not be exposed to retroactive liability merely by virtue of having followed settled practice endorsed by the federal government in its recommended forms for plan documents.

Respectfully submitted,

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November 7, 1994